

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	Chapter 11
SEARS HOLDINGS CORPORATION, et al.,	Case No. 18-23538 (RDD)
Debtors.	(Jointly Administered)

**LIMITED OBJECTION OF AND RESERVATION OF RIGHTS BY
SERITAGE SRC FINANCE LLC AND SERITAGE KMT FINANCE LLC, AS
LANDLORD, TO DEBTORS' NOTICES OF CURE COSTS AND POTENTIAL
ASSUMPTION AND ASSIGNMENT OF EXECUTORY CONTRACTS AND
UNEXPIRED LEASES IN CONNECTION WITH GLOBAL SALE TRANSACTION**

TO THE HONORABLE ROBERT D. DRAIN
UNITED STATES BANKRUPTCY JUDGE:

Seritage SRC Finance LLC and Seritage KMT Finance LLC (together, “Landlord”) hereby submit this limited objection and reservation of rights in connection with the Debtors’ (i) *Notice of Cure Costs and Potential Assumption and Assignment of Executory Contracts and Unexpired Leases in Connection with Global Sale Transaction* [ECF No. 1731] (the “Initial Cure Notice”), and (ii) *Supplemental Notice of Cure Costs and Potential Assumption and Assignment of Executory Contracts and Unexpired Leases in Connection with Global Sale Transaction* [ECF No. 1774] (the “Supplemental Cure Notice” and, together with the Initial Cure Notice, the “Cure Notices”), and respectfully represent as follows¹:

BACKGROUND

1. On October 15, 2018, Sears Holdings Corporation and its affiliated debtors (as such term is defined in the Cure Notices, the “Debtors”) filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”). The Debtors continue

¹ Terms not defined herein shall have the meaning ascribed to them in the Cure Notices, as applicable.

to operate their businesses and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in these chapter 11 cases.

2. Debtors Sears Operations LLC and Kmart Operations LLC lease nonresidential real property at 82 separate locations across the United States (the “Demised Premises”) from Landlord pursuant to a single, unitary and unexpired master lease, dated July 7, 2015 (as amended, the “Seritage Master Lease”).

3. On November 1, 2018, the Debtors filed the *Motion for Approval of Global Bidding Procedures* [ECF No. 429] (the “Bidding Procedures Motion”), which, among other things, requested approval of proposed procedures for (i) sales of the Debtors’ assets, including the sale of “a smaller footprint of [the Debtors’] profitable stores . . . as a going concern,” as well as sales of their non-core assets such as intellectual property and specialty businesses; and (ii) the assumption and assignment of the Debtors’ executory contracts or unexpired real property leases in connection with these sales. *See* Bidding Procedures Motion ¶ 1, 13.

4. On November 19, 2018, this Court entered an order approving the Bidding Procedures Motion. *See generally Order Approving Global Bidding Procedures and Granting Related Relief* [ECF No. 816] (the “Bidding Procedures Order”). Of particular relevance, the Bidding Procedures Order provides that any transfer of the Debtors’ real property interests in a transaction under that order would not, absent separate and express notice, operate to sever or otherwise impair any master lease to which a Debtor is a party. The Bidding Procedures Order states, in relevant part:

Nothing in this Order or the Global Bidding Procedures shall be deemed to authorize or shall be argued to permit the Debtors, their agents or advisors to take any action in connection with an unexpired master lease of nonresidential real property to which a Debtor is a party (each such lease, a

“Master Lease”) or other relief granted in this Order that is not in compliance with, or that would result in a default or breach under, such Master Lease, without either (a) an amendment to or waiver under such Master Lease, in accordance with its terms and all consents required for such amendment or waiver under such Master Lease or (b) the entry of a further order of the Court, in either case, permitting such action; *provided that if any property subject to a Master Lease is included in a Sale Transaction and the Debtors or any other party seek to sever a Master Lease applicable to such property, such relief shall be sought by expressly stating that such party is seeking to sever such Master Lease and describing with particularity the Master Lease and any non-Debtor counterparty to that Master Lease will have fourteen (14) calendar days to file and serve an objection to such Sale Transaction*; provided further that all rights, remedies, and positions of all parties to any Master Leases are preserved.

Bidding Procedures Order ¶ 50 (emphasis added).

5. Following the Court’s issuance of the Bidding Procedures Order, the Debtors filed the *Notice of Filing of Global Bidding Procedures Process Letter* [ECF No. 862] (Nov. 21, 2018), soliciting bids to purchase the Debtors’ assets, including the Debtors’ retail stores (or groups of stores) on a going concern or liquidation basis, and certain of the Debtors’ individual businesses (as defined collectively in the Cure Notices, the “Global Assets”). The Debtors commenced an auction of the Global Assets pursuant to the Bidding Procedures Order on January 14, 2019 (the “Auction”).

6. On January 18, 2019, following the conclusion of the Auction, the Debtors filed the *Notice of Successful Bidder and Sale Hearing* [ECF No. 1730] (the “Sale Notice”). The Sale Notice announced that the Debtors had selected a bid by Transform Holdco, LLC (the “Buyer”) as the “highest or best offer” for the Global Assets. Sale Notice ¶ 4. The Debtors also filed as an exhibit to the Sale Notice a proposed Asset Purchase Agreement between the Debtors and the Buyer (the “APA”), which sets out the terms of the Buyer’s purchase of the Global Assets from the Debtors (the “Proposed Sale”). The APA specifically provides for the assumption and assignment of the Seritage Master Lease in its entirety (if at all) in connection with the Proposed

Sale. In particular, section 9.15 of the APA states that “[a]ny assignment and assumption of Seritage Master Lease shall be an assignment and assumption of such Seritage Master Lease in its entirety, except as otherwise agreed by [Landlord]. . . .” APA § 9.15.

7. Alongside the Sale Notice, the Debtors also filed the Initial Cure Notice on January 18, 2019. The Initial Cure Notice sets forth, among other things, a list of the executory contracts and unexpired leases that the Debtors may assume and assign in connection with the Proposed Sale, as well as the monetary amounts (if any) the Debtors propose to pay in order to cure defaults under those agreements. *See* Initial Cure Notice ¶ 6, Exs. A & B. Although the Seritage Master Lease is a single, unitary agreement and the Debtors agreed in the APA to assume and assign the Seritage Master Lease in its entirety, the Initial Cure Notice only includes 54 stores that are subject to the Seritage Master Lease. *See id.* Ex. B. The Initial Cure Notice does not expressly state that any party is seeking to sever the Seritage Master Lease. *See generally* Initial Cure Notice.

8. Five days later, the Debtors filed the Supplemental Cure Notice, which, among other things, lists additional executory contracts and unexpired leases that the Debtors may assume and assign in connection with the Proposed Sale, as well as proposed cure costs for those agreements. *See* Supplemental Cure Notice ¶ 7, Exs. A-1 & B-1. The Supplemental Cure Notice includes 51 stores that are subject to the Seritage Master Lease. *See id.* Ex. B-1. And, like the Initial Cure Notice, the Supplemental Cure Notice does not expressly state that any party is seeking to sever the Seritage Master Lease. *See generally* Supplemental Cure Notice.

9. The Cure Notices also provide that Adequate Assurance Information (as defined in the Cure Notices) would “be distributed to applicable [c]ounterparties . . . to support the Buyer’s ability to comply with the requirements of adequate assurance of future performance,

including the Buyer's financial wherewithal and willingness to perform" under the Debtors' assumed and assigned contracts and leases. *See* Initial Cure Notice ¶ 9; Supplemental Cure Notice ¶ 10.

LIMITED OBJECTION

10. Landlord objects to the Cure Notices because the proposed cure amounts are incorrect and insufficient to cure all defaults under the Seritage Master Lease insofar as they do not appear to reflect accurately all of the Debtors' outstanding obligations under the terms of the Seritage Master Lease. Additionally, Landlord reserves all rights with respect to adequate assurance of the Buyer's future performance.

I. The Proposed Cure Amounts Are Insufficient to Cure All Defaults under the Seritage Master Lease

11. Prior to any assumption and assignment of the Seritage Master Lease, the Debtors are required to cure, or provide adequate assurance that the Debtors will promptly cure, all outstanding defaults under that agreement. *See* 11 U.S.C. § 365(b)(1).²

12. The proposed cure costs listed in the Cure Notices are incorrect and do not accurately reflect the full amount required to cure all outstanding defaults under the Seritage Master Lease. Here, the cure amount must include (without offsets) all pre-petition and post-petition charges due and owing under the Seritage Master Lease. This amount includes, but is not limited to, all defaults on the Debtors' obligations under the Seritage Master Lease with respect to the base rent, real estate taxes, utility charges, common area maintenance expenses,

² For the avoidance of doubt, the Debtors are required to cure all defaults under the Seritage Master Lease. It is well settled that a debtor must assume and assign its unexpired leases of real property in their entirety. *See, e.g., N.L.R.B. v. Bildisco & Bildisco*, 465 U.S. 513, 531 (1984) ("Should the debtor-in-possession elect to assume the executory contract, . . . it assumes the contract *cum onere*."); *In re Texaco, Inc.*, 254 B.R. 536, 550 (Bankr. S.D.N.Y. 2000) ("The law is clear that a debtor who assumes a lease or other executory contract assumes the contract *cum onere*, without any diminution in its obligations or impairment of the rights of the lessor in the present or the future."). Landlord reserves all rights with respect to same, including with respect to the ability of the Debtors to cure non-monetary defaults.

operating expenses (including reasonable attorneys' fees), mechanics' liens, Landlord's insurance costs, and accrued interest. Furthermore, the Debtors must cure any defaults with respect to the costs, fees, and charges incurred in connection with all encumbrances upon the Demised Premises.³

13. A review of the books and records of Landlord with respect to the Demised Premises reveals an adequate actual cure amount of not less than \$28,104,726.66 as of the date of this Objection. A schedule setting out the aggregate amount required to cure the defaults on the Seritage Master Lease is attached hereto as Exhibit A. Landlord reserves its rights with respect to the reconciliation of cure costs once it receives the Debtors' proposed aggregated cure cost amount for the defaults on the Seritage Master Lease as a whole.

14. Furthermore, as a result of year-end adjustments (or other adjustments) as provided for in the Seritage Master Lease, additional amounts may become due and owing by the Debtors after the date of this Objection but prior to any assumption and assignment of the Seritage Master Lease. Accordingly, Landlord also reserves the right to amend this Objection or assert additional objections in order to reflect any additional amounts that are outstanding or become outstanding under the Seritage Master Lease prior to any assumption and assignment (including any and all additional post-petition administrative expenses that accrue, but remain unpaid, prior to the assumption and assignment of the Seritage Master Lease).

³ Relatedly, the encumbrances on the Demised Premises under the Seritage Master Lease (including, without limitation, covenants, conditions, easements, rights of way, and similar restrictions) must remain in full force and effect notwithstanding any sale of the Demised Premises. *See, e.g., Gouveia v. Tazbir*, 37 F.3d 295, 298 (7th Cir. 1994) (finding that covenants running with the land are property interests and cannot be extinguished through bankruptcy). To the extent the Debtors ultimately seek to sell or otherwise transfer the Demised Premises free and clear of the encumbrances under the Seritage Master Lease, Landlord specifically reserves the right to further object to such sale or transfer.

II. Landlord Reserves Its Rights With Respect to Adequate Assurance Information

15. Pursuant to sections 365(b)(1)(C) and 365(f)(2)(B) of the Bankruptcy Code, a debtor is required to provide “adequate assurance of future performance” with respect to its leases. The debtor bears the burden of demonstrating to the Court that the requirements for assumption under section 365 have been met. *See In re M. Fine Lumber Co., Inc.*, 383 B.R. 565, 573 (Bankr. E.D.N.Y. 2008); *In re Embers 86th Street, Inc.*, 184 B.R. 892, 902 (Bankr. S.D.N.Y. 1995). In assessing adequate assurance of future performance, “the test is . . . whether it appears that the rent will be paid and other obligations met.” *Id.* (citing *In re THW Enterprises, Inc.*, 89 B.R. 351, 357 (Bankr. S.D.N.Y. 1988)). In performing this analysis, courts “look for evidence of profitability[,] . . . a plan which would earmark money exclusively for the landlord[,] . . . or the willingness of debtor or debtor’s assignee to fund the cure payments.” *Embers*, 184 B.R. at 902.

16. Landlord is aware that certain counterparties have stated that they have received adequate assurance information from the Debtors in connection with the Proposed Sale. Any assumption and assignment of the Seritage Master Lease must be subject to a finding by the Court that the Debtors have provided adequate assurance of future performance to Landlord.

17. Landlord reserves its rights with respect to the form, manner, and substance of any adequate assurance of future performance that the Debtors may deliver in connection with any assumption and assignment of the Seritage Master Lease.

RESERVATION OF RIGHTS

18. Landlord hereby reserves any and all rights, remedies and claims against the Debtors, and does not waive (and hereby reserves) any objections, available to Landlord under the Seritage Master Lease or applicable law in connection with any actions or omissions (whether arising from the Cure Notices or otherwise) that violate or are in any way inconsistent with the terms of the Seritage Master Lease.

19. Furthermore, Landlord reserves the right, at or prior to any hearing held with respect to the Proposed Sale or the Cure Notices, to modify, amend, or supplement this Objection and raise additional objections to any proposed order or transaction tendered in connection with the relief requested by the Debtors with respect to the Proposed Sale and the Cure Notices.

JOINDER

20. Landlord joins in any other objections filed by the Debtors' landlords to the Proposed Sale and the Cure Notices to the extent such objections are not inconsistent with this Objection.

WHEREFORE, Landlord enters this limited objection in connection with the Cure Notices and requests that the Court enter an Order granting such relief as the Court deems just and proper.

Dated: New York, New York
January 31, 2019

Respectfully submitted,

FRIED, FRANK, HARRIS, SHRIVER
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By: /s/ Peter B. Siroka

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EXHIBIT A

SERITAGE GROWTH PROPERTIES
CURE COSTS BY PROPERTY

SITE	PROPERTY	GROSS AMOUNT
1089 AKAnchorage1089		1,214,215.82
9571 ALCullman9571		18.71
9711 ARRussellville9711		1,057.45
1206 ARNorth Little Rock1206		26,128.70
3695 AZSierra Vista3695		46.27
1078 AZMesa1078		2,568.67
1338 AZTucson1338		157,270.80
1708 AZPhoenix 1708		10,784.22
2047 AZSierra Vista2047		2,253.19
2078 AZYuma2078		13,497.38
2218 AZPrescott2218		5,685.19
2358 AZFlagstaff2358		6,764.06
3678 CARamona3678		228,088.77
1358 CAChula Vista1358		36,925.17
1398 CASan Bernardino1398		1,995.58
1408 CAFlorin1408		1,922.35
1438 CAEl Cajon1438		148,549.74
3945 CADelano3945		46,994.35
4432 CARiverside4432		34,485.59
1478 CASan Bruno1478		2,693,792.68
1488 CASan Jose1488		161,089.57
1508 CANorthridge1508		115,642.32
1538 CACitrus Heights1538		79,400.01
4762 CAAntioch4762		13,480.90
1568 CACarson1568		75,445.68
1608 CAWestminster1608		766,329.65
1648 CASan Diego1648		136,775.67
1688 CASalinas1688		9,930.81
7390 CAMckinleyville7390		604.10
1698 CANewark1698		79,293.66
1748 CAMontclair1748		7,568.21
1868 CAMoreno Valley1868		2,119.21
1968 CAPalm Desert1968		1,875.52
7639 CASanta Paula7639		4,371.78
1988 CAEl Centro1988		14,073.58
2068 CAVisalia2068		13,706.53
2088 CASanta Maria2088		82,059.23
2298 CAMerced2298		924.01
2308 CASanta Cruz2308		203,432.77
2318 CATHousand Oaks2318		154,355.15
2663 CAPortsmouth2663		25,728.24
7653 CABig Bear Lake7653		327,302.47

1108 CATemecula1108	166,338.55
1148 CAVentura1148	211,594.05
1156 CARoseville1156	77,854.78
1159 CAFairfield1159	401,232.30
1168 CANorth Hollywood1168	262,284.01
1178 CASanta Monica1178	1,102,815.49
1189 CAWest Covina1189	8,154.50
1208 CAFresno1208	11,604.70
1298 CARiverside1298	178,165.95
4917 COThornton4917	136.20
1071 COLakewood1071	32,856.99
1063 CTWest Hartford1063	5,859.03
1193 CTWaterford1193	86,031.11
7725 DERehoboth Beach7725	18,748.05
4292 FLHialeah4292	22,774.68
4295 FLNorth Miami4295	147,728.45
4355 FLSt. Petersburg4355	23,006.04
1715 FLDoral1715	31,652.89
1955 FLLakeland1955	5,276.83
2245 FLMelbourne2245	3,239.21
2565 FLBradenton2565	2,220.93
7233 FLKissimmee7233	90,820.00
2695 FLNaples2695	20,636.40
2805 FLPanama City2805	1,867.18
7321 FLBradenton7321	2,307.22
1006 FLOcala1006	8,271.00
1096 FLPensacola1096	12,221.62
1225 FLOrlando1225	112,039.99
1295 FLSt. Petersburg1295	43,551.29
1345 FLHialeah1345	68,352.55
1355 FLAltamonte Springs1355	42,717.74
1365 FLMiami1365	139,737.52
1415 FLClearwater1415	257,214.89
1495 FLFt. Myers1495	5,247.28
1535 FLPlantation1535	136,421.12
1625 FLSarasota1625	27,283.31
1645 FLBoca Raton1645	604,767.09
1655 FLMiami1655	81,133.30
1665 FLGainesville1665	11,310.35
1305 GASavannah1305	193,758.70
1385 GAAtlanta1385	54.45
7480 HIHonolulu7480	6,947.46
7767 IACharles City7767	868.46
9220 IAAlgona9220	14,428.53
9309 IAWebster City9309	915.39
2212 IACedar Rapids2212	26,185.02
1229 IDBoise1229	2,234.94

3241 ILSpringfield3241	14,586.21
3594 ILChicago3594	21.11
4297 ILMoline4297	90,213.19
7289 ILSteger7289	22,697.27
1090 ILChicago1090	287,518.09
1380 ILChicago1380	281,790.15
1740 ILJoliet1740	4,386.82
1750 ILOrland Park1750	429,386.24
1212 ILNorth Riverside1212	343,370.58
3180 INMerrillville3180	27,557.58
3556 INElkhart3556	346.66
1830 INFt. Wayne1830	324,360.00
9647 KSLeavenworth*9647	10,650.08
1101 KSOverland Pk1101	94,613.17
7430 KYOwensboro7430	6,654.82
7607 KYHopkinsville7607	57,591.83
2176 KYPaducah2176	37,479.28
3320 LAHouma3320	110.41
7061 LANew Iberia7061	444.18
1347 LALafayette1347	43.70
3879 MABraintree3879	-
1053 MASaugus1053	179,895.13
7713 MDEdgewater7713	171,045.96
1864 MDCockeysville1864	39,752.37
2034 MDBowie2034	417,095.16
2945 MDHagerstown2945	229,429.55
9521 MEMadawaska9521	687.97
4177 MISt. Clair Shores4177	107,134.22
4845 MIManistee4845	19.51
7733 MIAlpena7733	25.68
9586 MISault Ste. Marie9586	20.41
1250 MILincoln Park1250	151,676.62
1450 MIRoseville1450	200,296.07
1490 MITroy1490	202,529.00
2050 MIJackson2050	156,642.01
3775 MNDetroit Lakes3775	81,124.71
1052 MNSt. Paul1052	60,301.35
1122 MNMaplewood1122	91,112.39
1132 MNBurnsville1132	44.87
4304 MOFlorissant4304	101,246.45
7018 MOJefferson City7018	17,729.11
7021 MOCape Girardeau7021	23,386.52
7719 MSColumbus7719	198,713.05
4814 MTHavre4814	917.08
4758 NCConcord4758	92,626.09
1185 NCAshville1185	215,129.41
4353 NDMinot4353	265,797.49

3814 NEKearney3814	194.18
1003 NHSalem1003	145,266.38
1313 NHNashua1313	226.39
2443 NHManchester2443	60,058.14
1294 NJWatchung1294	112,626.15
1434 NJWayne1434	67,084.89
1574 NJMiddletown1574	314,489.48
7016 NMHobbs7016	1,912.38
7035 NMFarmington7035	25.85
7755 NMDeming7755	19.73
9819 NVHenderson9819	28.68
1668 NVLas Vegas1668	1,001,637.95
1978 NVReno1978	156,284.01
7676 NYSidney7676	2,202.97
7695 NYOlean7695	12,759.68
1103 NYAlbany1103	123,868.42
1264 NYHicksville1264	1,227,575.68
1524 NYRochester1524	19,495.95
1584 NYVictor1584	23,864.81
1623 NYClay1623	46,213.97
1784 NYJohnson City1784	15,023.05
1794 NYEast Northport1794	3,369.30
1944 NYYorktown Heights1944	507,061.06
3142 OHTallmadge3142	86,107.89
3243 OHNorth Canton3243	138,153.67
7477 OHMarietta7477	11,105.56
7736 OHKenton7736	20.02
1220 OHToledo1220	52.80
1350 OHMentor1350	52.65
1410 OHCanion1410	416,663.18
1430 OHMiddleburg Heights1430	47,125.21
1520 OHChapel Hill1520	212,064.17
1560 OHDayton1560	81,324.28
7003 OKMuskogee7003	17.55
1091 OKOklahoma City1091	11,921.24
3888 ORThe Dalles3888	2,158.88
1119 ORHappy Valley1119	92,246.90
3911 PAColumbia3911	10,709.01
3954 PAWalnutport3954	732.53
4313 PAYork4313	2,634.83
7699 PALebanon7699	4,473.46
7746 PACarlisle7746	9,702.72
9770 PAMount Pleasant9770	20.69
3882 PRMayaguez3882	348,247.64
7741 PRPonce7741	179,579.79
7768 PRGuaynabo7768	1,325,903.04
7788 PRBayamon7788	402,352.54

1085 PRCaguas1085	1,844.25
1925 PRCarolina1925	763,776.05
7043 SCRock Hill7043	3,554.66
7754 SCAnderson7754	17,218.21
1325 SCCharleston1325	85,896.69
7318 SDSioux Falls7318	11,549.79
1146 TNCordova1146	11,428.51
1186 TNMemphis1186	190.95
4205 TXEI Paso4205	27,705.62
7077 TXHarlingen7077	66.57
1057 TXValley View1057	46,754.70
1067 TXHouston1067	638,714.91
1167 TXSan Antonio1167	76,002.60
1197 TXWestwood1197	26,287.20
1227 TXDallas1227	131,844.08
1257 TXFriendswood1257	2,761.93
1277 TXIngram1277	3,054.29
1847 TXAustin1847	102,750.85
2147 TXIrving2147	385,668.46
1127 TXShepherd1127	2,535.87
7426 UTLayout7426	53,504.68
1888 UTWest Jordan1888	251,786.14
1265 VAVirginia Beach1265	302,959.61
1284 VAAlexandria1284	51,819.05
1575 VAHampton1575	1,755.90
1615 VAChesapeake1615	7,723.04
1814 VAFairfax1814	85,815.38
2514 VAWarrenton2514	11,926.20
4439 WAYakima4439	36.65
1069 WARedmond1069	458,970.61
2239 WAVancouver2239	67,597.85
3970 WIPlatteville3970	21.24
1082 WIGreendale1082	28,391.26
2382 WIMadison2382	55,496.88
3724 WVScott Depot3724	38,525.22
3877 WVElkins3877	47,245.82
4188 WVCharleston4188	25,862.07
4736 WYCasper4736	8,763.75
4837 WYRiverton4837	155.63
4863 WYGillette4863	36,507.33
1083 RIWarwick1083	347,976.01
	<u>28,104,726.66</u>